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2005 - 2006 LEGISLATURE

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SENATE SUBSTITUTE  
AMENDMENT

KJF&WJ  
TO

2005 SENATE BILL 448

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November 22, 2005 - Introduced by Senators OLSEN, STEPP, HARSDORF, SCHULTZ, ZIEN, KEDZIE, LAZICH, LEIBHAM, ROESSLER, S. FITZGERALD, DARLING, BROWN and KANAVAS, cosponsored by Representatives WIECKERT, LOEFFELHOLZ, SHILLING, OWENS, MUSSER, KESTELL, JESKEWITZ, F. LASEE, MONTGOMERY, GARD, ALBERS, TOWNSEND, DAVIS, PETROWSKI, PETTIS, NELSON, KREIBICH, OTT, HAHN, SUDER, LAMB, J. FITZGERALD, VOS, LEMAHIEU, GUNDRUM, RHOADES, GRONEMUS, VRUWINK and HUEBSCH. Referred to Committee on Housing and Financial Institutions.

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- 1 AN ACT to create 101.148 and 895.07 of the statutes; relating to: contractor's  
2 notices, claims against certain contractors and suppliers of dwellings, and  
3 providing a penalty.

***Analysis by the Legislative Reference Bureau***

This bill requires contractors and subcontractors who contract to construct a home or to remodel a home or manufactured home to provide a notice to the homeowner telling the homeowner that he or she must follow the procedure in this bill before suing a contractor, subcontractor, or door or window supplier. Under the bill, if a homeowner, which includes condominium associations, is concerned about a possible construction defect, the homeowner must give written notice of the claim to the contractor at least 90 working days before starting an action against the contractor. The bill requires the written notice of the claim to detail the nature of the alleged defect, including any evidence and information the homeowner has that depicts the nature and cause of the defect.

After the contractor receives the notice, the bill gives the contractor time to respond to the notice with a written offer to inspect the property, make repairs, settle the claim with a monetary payment, or reject the claim. Under the bill, if the claim is rejected at this point, the homeowner can start an action against the contractor. The bill requires the homeowner to allow the contractor access to the home if the contractor wants to inspect the alleged defect. If the contractor makes a settlement offer and the homeowner rejects the offer, the homeowner must do so with a written statement that includes the factual reasons for the rejection and any known legal

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reasons for the rejection. The bill allows the contractor to submit a timely supplemental offer in response to the homeowner's rejection and requires the homeowner to respond to the supplemental offer under the same procedures as he or she responds to an original offer.

If the property is inspected and requires some destructive testing, the bill requires the contractor to return the dwelling to its preinspection condition after finishing the inspection and testing. After the inspection, the bill gives the contractor an opportunity to remedy the defect, settle the claim with a monetary settlement, or refuse to remedy the alleged defect. Under the bill, if the contractor refuses to remedy the alleged defect, after notification the homeowner may start an action regarding the defect. If the homeowner agrees to a contractor's settlement offer, and the contractor does not follow through as agreed, the bill allows the homeowner to include in its court action the offer and acceptance as rebuttable evidence of an agreement.

Under the bill, if a homeowner rejects a reasonable settlement offer or does not permit the contractor to repair the defect, the homeowner's damages are limited to the fair market value of the offer of settlement or the actual costs of the repairs, whichever is less, or the amount of the monetary offer of settlement.

The bill allows a homeowner to repair a defect immediately without giving notice if the repair is necessary for health or safety.

The bill also provides that the contractor or supplier may not be liable for damages for a defect if the damage is caused by normal shrinkage or settlement of the construction, if the contractor or supplier relied on written information from a public agency, if the defect was known by or disclosed to the homeowner before the purchase, the dwelling was purchased "as is," the defect could have been discovered by the homeowner with due diligence before purchasing the dwelling, or the contractor or supplier was not allowed to perform warranty service work.

Condominium associations and other homeowner associations are required by the bill to follow additional procedures before bringing an action for a construction defect, including receiving approval from each unit's owner who is affected by that action, the majority of the unit owners vote for the action, and the association's board of directors negotiated in good faith with the contractor to resolve the defect.

Under the bill, a contractor may obtain contribution from a window or door supplier for the cost of repairing the defect if the contractor follows procedures in the bill similar to those that apply to the contractor and homeowner regarding a defect, including notifying the supplier of the alleged defect and giving the supplier an opportunity to remedy the defect or to make an offer of settlement.

The bill requires the Department of Commerce to prepare a draft of a brochure that explains the process in this bill and provide that draft to contractors. Contractors are required to give a copy of the brochure to homeowners.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

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SECTION 1. 101.148 of the statutes is created to read:

**101.148 Contractor notices. (1) DEFINITIONS.** In this section:

(a) "Claimant" has the meaning given in s. 895.07 (1)(c).

(b) "Contractor" means a person <sup>who written or oral</sup> ~~that~~ enters into a contract with a <sup>consumer</sup> ~~potential~~ claimant to construct a dwelling <sup>or remodel</sup> ~~on the potential claimant's land~~, to complete a remodeling project on a dwelling on the potential claimant's land, or to complete a remodeling project on the potential claimant's manufactured home. "Contractor" includes a subcontractor.

(c) "Dwelling" means any structure or part of a structure that is intended for use as a home, residence, or sleeping place by one or more persons maintaining a common household, to the exclusion of all others.

(d) "Manufactured home" has the meaning given in s. 101.91 (2).

(e) "Remodel" does not include maintenance and repair work.

(f) "Supplier" means a person that manufactures or supplies windows or doors for a dwelling.

(2) NOTICE REQUIRED AT TIME OF CONTRACTING. (a) <sup>Before</sup> ~~Upon~~ entering into a contract to construct a dwelling, <sup>or remodel</sup> ~~to complete a remodeling project on a dwelling~~, or to complete a remodeling project on a manufactured home, <sup>(insert 3-17)</sup> ~~the contractor shall give the potential claimant, if any,~~ <sup>consumer</sup> a copy of the brochure prepared under s. 895.07 (12) <sup>or (11)</sup> and a notice worded substantially as follows:

## NOTICE CONCERNING CONSTRUCTION

## DEFECTS

Wisconsin law contains important requirements you must follow before you may file a lawsuit for defective construction against the contractor who constructed your dwelling or completed your remodeling project or against window or door

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## SECTION 1

1 suppliers. For example, section 895.07 (2) and (3) of the Wisconsin statutes requires  
2 you to deliver to the contractor a written notice of any construction conditions you  
3 allege are defective before you file your lawsuit, and you must provide your  
4 contractor or window or door suppliers the opportunity to make an offer to repair or  
5 pay for the construction defects. You are not obligated to accept any offer made by  
6 the contractor or window or door <sup>supplier</sup> suppliers, but failure to accept a reasonable offer  
7 may limit your recoverable damages. All parties are bound by applicable warranty  
8 provisions.

9 (b) The notice required under par. (a) shall be conspicuous and in writing and  
10 may be included within the contract between the contractor and the potential  
11 claimant.

12 SECTION 2. 895.07 of the statutes is created to read:

13 **895.07 Claims against contractors and suppliers. (1) DEFINITIONS.** In this  
14 section:

15 (a) "Action" means a civil action or an arbitration under ch. 788. insert 8-19

16 <sup>(c)</sup> (b) "Claimant" means ~~a homeowner, other than a developer or builder, who~~  
17 ~~asserts a claim against a contractor or supplier concerning a construction defect.~~

18 (c) "Construction defect" has the meaning assigned by a written, express  
19 warranty provided by the contractor or, if no such meaning is assigned by warranty,  
20 means a deficiency in the specifications, planning, supervision, construction, or  
21 remodeling of a dwelling or in the remodeling of a manufactured home that results

22 from any of the following: ← stays  
23

24 1. Defective material.

25 2. Violation of applicable codes.

3. Failure to follow accepted trade standards for workmanlike construction.

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(d) "Contractor" means a person including a subcontractor, <sup>who</sup> enters into a <sup>written or oral</sup> contract with a potential claimant to construct <sup>or remodel</sup> a dwelling or to complete a remodeling project on a dwelling or manufactured home.

(e) "Dwelling" means any structure or part of a structure that is intended for use as a home, residence, or sleeping place by one or more persons maintaining a common household, to the exclusion of all others.

(f) "Manufactured home" has the meaning given in s. 101.91 (2).

(g) "Serve" or "service" means personal service or delivery by certified mail, return receipt requested, to the last-known address of the addressee.

(h) "Supplier" means a person that manufactures or supplies windows or doors for a dwelling.

(j) "Working day" means any day except Saturday, Sunday, and holidays designated in s. 230.35 (4) (a).

(3) (2) ACTION; DISMISSAL WITHOUT PREJUDICE. Before filing an action against a contractor or supplier for a construction defect, the claimant shall serve the contractor with a written notice of the claim that describes the claim in sufficient detail to determine the general nature of the construction defect. If the claimant files an action but fails to serve the notice of claim, the circuit court shall dismiss the action without prejudice, and the action may not be refiled until the claimant has complied with the requirements of this subsection.

(2) (3) NOTICE AND OPPORTUNITY TO REPAIR. (a) No later than 90 working days before initiating an action against a contractor or supplier under this section, the claimant shall serve written notice of claim under sub (2) on the contractor. The notice of claim shall state that the claimant asserts a construction defect claim or claims and is providing notice under this paragraph. The notice of claim shall describe the claim

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## SECTION 2

1 or claims in sufficient detail to explain the nature of the alleged construction defect  
2 and the results of the construction defects. <sup>insert 6-2</sup> The claimant shall provide to the  
3 contractor all evidence the claimant knows or possesses, including expert reports,  
4 photographs, electronic mail, and videotapes that depict the nature and cause of the  
5 alleged construction defect. In addition, the claimant shall provide to the contractor  
6 any evidence discoverable under ch. 804 that depicts the nature and cause of the  
7 construction defect, including expert reports, photographs, and videotapes.

8 (b) Within 15 working days after the claimant serves notice of claim under par.

9 (a), or within 25 working days if the contractor makes a claim for contribution from  
10 a supplier under sub. (9) (a), each contractor that has received the notice of claim ~~may~~ <sup>shall</sup>

11 serve on the claimant, and on any other contractor that has received the notice of  
12 claim and on any supplier that has received a claim for contribution under sub. (9)

13 (a), a written response to the claim or claims that ~~either~~ <sup>rejects the claim</sup> offers to settle the claim by  
14 monetary payment, the making of repairs, or a combination of both, without  
15 inspection, or proposes to inspect the dwelling that is the subject of the claim. <sup>insert 6-15</sup>

16 (c) Within 15 working days after a supplier has received notice that a contractor  
17 is seeking contribution under sub. (9) (a), the supplier may serve the contractor with  
18 a written response that offers to settle the contribution claim by payment, by repair,  
19 or by both payment and repair without inspection or that offers to inspect the  
20 dwelling that is the subject of the contribution claim. If a contribution claim is made,  
21 the contractor shall forward all responses from the supplier to the claimant. The  
22 supplier and contractor shall use their best efforts to coordinate their responses to  
23 claims and contribution claims.

24 (c) (d) If the contractor ~~wholly~~ rejects the claim and will ~~neither remedy the alleged~~  
25 ~~construction defect nor settle the claim~~ or does not respond to the claimant's notice

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1 of claim within the time under par. (b), the claimant may bring an action against the  
2 contractor for the claims described in the notice of claim without further notice.

3 (d) (e) If the claimant rejects a settlement offer made by the contractor, the  
4 claimant shall provide written notice of the claimant's rejection to the contractor.

5 The notice shall include the ~~specific factual and, if known, legal~~ reasons for the  
6 claimant's rejection of the contractor's proposal or offer. If the claimant believes that  
7 the settlement offer omits reference to any portion of the claim, or was unreasonable,  
8 the claimant shall in its written notice include those items that the claimant believes  
9 were omitted and set forth ~~in detail~~ <sup>the</sup> all reasons why the claimant believes the  
10 settlement offer is unreasonable. The contractor shall forward the claimant's  
11 response to a supplier upon whom a contribution claim has been made.

12 (e) (f) If a proposal for inspection is made under par. (b), the claimant shall, within  
13 15 working days of receiving the contractor's proposal, provide the contractor and  
14 any supplier on whom a contribution claim has been made and its agents, experts,  
15 and consultants ~~prompt and complete~~ <sup>reasonable</sup> access to the dwelling to inspect the dwelling,  
16 document any alleged construction defects, and perform any testing required to  
17 evaluate fully the nature, extent, and cause of the claimed construction defects and  
18 the nature and extent of any repairs or replacements that may be necessary to  
19 remedy them. If destructive testing is required, the contractor shall give the  
20 claimant and all persons on whom a notice of claim or contribution claim has been  
21 served advance notice of the testing at least 5 working days before commencement  
22 of the testing and shall, after completion of the testing, return the dwelling to its  
23 <sup>within a reasonable time after completion of the testing</sup> pre-testing condition. If any inspection or testing reveals a condition that requires  
24 additional testing to allow the contractor to evaluate fully the nature, cause, and  
25 extent of the construction defect, the contractor shall provide notice to the claimant

at the contractor's  
expense

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1 and all persons on whom a notice of claim or contribution claim has been served of  
2 the need for the additional testing and the claimant shall provide access under this  
3 paragraph. If a claim is asserted on behalf of the owners of multiple dwellings, or  
4 multiple owners of units within a multifamily complex, then the contractor shall be  
5 entitled to inspect each of the dwellings or units. The claimant shall either provide  
6 a specific day for the inspection upon reasonable notice for an inspection or require  
7 the contractor to request in writing a day, at least 3 working days before the  
8 inspection.

(f)  
(g) Within 10 working days following completion of the inspection and receipt  
10 of all testing results under par. (e), the contractor ~~may~~ <sup>shall</sup> serve on the claimant any of  
11 the following:

12 1. A written offer to remedy fully or partially the construction defect at no cost  
13 to the claimant. The offer shall include a description of any additional construction  
14 necessary to remedy the construction defect and a timetable for the completion of the  
15 construction.

16 2. A written offer to settle the claim by monetary payment.

17 3. A written offer including a combination of repairs and monetary payment.

18 4. A written statement that the contractor will not proceed further to remedy  
19 the construction defect. <sup>(insert 8-19)</sup>

(g) (f)  
20 (h) If a claimant accepts a contractor's offer made under par. (g) within 15  
21 working days after receipt of the offer, or if the offer is deemed accepted under par.  
22 (m) (n) and the contractor does not proceed to make the monetary payment or remedy  
23 the construction defect within the agreed timetable, the claimant may bring an  
24 action against the contractor for the claim described in the notice of claim without  
25 further notice. The claimant may also file the contractor's offer and claimant's



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1 acceptance in the circuit court action, and the offer and acceptance creates a  
2 rebuttable presumption that a binding and valid settlement agreement has been  
3 created and should be enforced by the court.

4 (h) If a claimant receives a written statement that the contractor will not  
5 proceed further to remedy the construction defect, the claimant may bring an action  
6 against the contractor for the claim described in the notice of claim without further  
7 notice.

8 (i) If the claimant rejects the offer made by the contractor to remedy the  
9 construction defect or to settle the claim by monetary payment or a combination of  
10 each, the claimant shall serve written notice of the claimant's rejection on the  
11 contractor within 15 working days after receipt of the offer. The notice shall include  
12 the specific factual and, if known, legal reasons for the claimant's rejection of the  
13 contractor's offer. If the claimant believes the contractor's settlement offer is  
14 unreasonable, the claimant shall set forth in detail all the reasons why the claimant  
15 believes the settlement offer is unreasonable.

16 (j) Upon receipt of a claimant's rejection and the reasons for the rejection, the  
17 contractor shall within 5 working days after receiving the rejection, make a  
18 supplemental offer of repair or monetary payment to the claimant. or provide the claimant written notice that no offer will be made

19 (k) If the claimant rejects the supplemental offer made by the contractor under  
20 par. (j) to remedy the construction defect or to settle the claim by monetary payment  
21 or a combination of each, the claimant shall serve written notice of the claimant's  
22 rejection on the contractor within 15 working days after receipt of the supplemental  
23 offer. The notice shall include the specific factual and, if known, legal reasons for the  
24 claimant's rejection of the contractor's supplemental settlement offer. If the claimant  
25 believes the contractor's supplemental settlement offer is unreasonable, the

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claimant shall set forth in detail all reasons why the claimant believes the supplemental settlement offer is unreasonable. If the contractor declines to make a supplemental offer, or if the claimant rejects the supplemental offer, the claimant may bring an action against the contractor for the claim described in the notice of claim without further notice.

(L) (m) If a claimant rejects a reasonable offer or reasonable supplemental offer *or fails to comply in good faith with the requirements* made under this subsection, or does not permit the contractor to repair the construction defect pursuant to an accepted offer of settlement, the claimant may not recover an amount in excess of the fair market value of the offer of settlement, or the actual cost of the repairs made, whichever is less, or the amount of a monetary offer of settlement. For purposes of this paragraph, the trier of fact shall determine the reasonableness of an offer of settlement. If the claimant has rejected a reasonable *or fails to comply in good faith with the requirements of this subsection* offer or reasonable supplemental offer, and any other law allows the claimant to *punitive damages,* recover costs, and attorney fees, then the claimant may recover *not these punitive damages,* no costs, or attorney fees incurred after the date of its rejection. *(in sect 10-15)*

(m) (n) A claimant accepting the offer of the contractor to remedy a construction defect shall do so by serving the contractor with a written notice of acceptance within ~~a reasonable period of time after receipt of the contractor's settlement offer, but no~~ later than 15 working days after receipt of the offer. If no response is served upon the contractor within the 15-working day period, then the offer shall be deemed *rejected* ~~accepted~~. If all requirements under this section *accepted* have been fulfilled, and if the claimant has rejected any outstanding offers, the claimant may bring an action against the contractor for the claim described in the notice of claim without further notice.

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(1) (cn) (or) If a claimant accepts a contractor's offer to repair a construction defect described in a notice of claim, the claimant shall provide the contractor and its agents, experts, and consultants ~~prompt and unfettered~~ <sup>reasonable</sup> access to the dwelling to perform and complete the construction by the timetable stated in the settlement offer.

(6) (o) (p) If, during the pendency of the notice, inspection, offer, acceptance, or repair process, an applicable limitation period would otherwise expire, the limitation period is tolled pending completion of the notice of claim process described in this section. This paragraph shall not be construed to revive a limitation period that has expired before the date on which a claimant's written notice of claim is served or extend any applicable statute of repose.

(12) (p) (q) After the sending of the initial notice of claim and initial contribution claim, a claimant, a contractor, and a supplier may, by written mutual agreement, alter the procedure for the notice of claim process described in this section.

Insert 11-14  
Insert from p. 5  
→ (4) CONTRACTOR OR SUPPLIER NOT LIABLE FOR CERTAIN DAMAGES. In an action relating to a dwelling involving a construction defect, a contractor or supplier shall not be liable for damages involving or caused by any of the following:

(a) Normal shrinkage due to drying or settlement of construction components within the tolerance of construction standards.

(b) The contractor's or supplier's reliance on written information relating to the dwelling that was obtained from official government records or provided by a government entity.

(c) Any construction defect known by or disclosed to a claimant in writing before his or her purchase of the dwelling.

(d) Any construction defect in a dwelling that is purchased in "as is" condition.

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(e) If the claimant is not the first owner of the dwelling, any construction defect known by the claimant or that could have been discovered by the claimant through the exercise of reasonable diligence before the claimant's purchase of the dwelling.

(f) Refusal of anyone to allow the contractor or supplier or the contractor's or supplier's agents to perform their warranty service work.

(4) (5) WARRANTY TERMS. The claimant and contractor or supplier are bound by any contractor or supplier warranty terms pertaining to products or services supplied for the dwelling.

(5) (6) ADDITIONAL CONSTRUCTION DEFECTS AND NOTICE AND OPPORTUNITY TO REPAIR. A construction defect that is discovered after an initial claim or contribution claim notice has been provided may not be alleged in an action until the claimant or contractor has given the contractor or supplier who performed the original construction work or provided supplies written notice of the new claim or contribution claim regarding the alleged new construction defect based on the claimant's or contractor's most current records. The contractor or supplier shall have an opportunity to resolve the notice of the new claim or contribution claim in the manner provided in subs. (2) and (8).

(6) (7) RELEASE ~~INSURANCE~~. If a claimant or contractor accepts an offer made in compliance with this section and the contractor or supplier fulfills the offer in compliance with this section, an action brought by the claimant or contractor for the claim described in the notice of claim shall be dismissed with prejudice and the contractor or supplier is, for insurance purposes, legally obligated to make the repairs or the monetary payment as if the claimant or contractor had recovered a judgment against the contractor or supplier in the amount of the cost of the repairs or the amount of the monetary payment.

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(7)

(8)

1 ACTION OF ASSOCIATIONS. (a) In this subsection, “association” means a  
2 homeowner’s association, condominium association under s. 703.02 (1m), unit  
3 owner’s association, or a nonprofit corporation created to own and operate portions  
4 of a planned community that may assess unit owners for the costs incurred in the  
5 performance of the association’s obligations.

6 (b) A person may not provide or offer to provide anything of value, directly or  
7 indirectly, to a property manager of an association or to a member or officer of an  
8 association to induce the property manager, member, or officer to encourage the  
9 association to file or discourage the association from filing a claim for damages  
10 arising from a construction defect.

11 (c) A property manager retained by an association or a member or officer of an  
12 association may not accept anything of value, directly or indirectly, in exchange for  
13 encouraging to file or discouraging from filing a claim for damages on behalf of the  
14 association arising from a construction defect.

15 (d) A person who knowingly violates par. (b) or (c) may be fined not more than  
16 \$500 or imprisoned not more than 30 days, or both.

17 (e) An association may bring an action against a contractor <sup>or supplier</sup> to recover damages  
18 <sup>that result</sup> resulting from construction defects in any of the common elements or limited  
19 <sup>or to the extent it has standing to sue on behalf of its members</sup> common elements of a condominium, as defined in s. 703.02 (2) and (10). Such an

20 action may be maintained only after all of the following occur:

21 1. The association first obtains the written approval of each unit’s owner whose  
22 interest in the common elements or limited common elements will be subject of the  
23 action.

24 2. A vote is held of the units’ owners to which at least a majority of the votes  
25 of the members of the association are allocated.

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1       3. The full board of directors of the association and the contractor have met in  
2 person and conferred in a good faith attempt to resolve the association's claim, or the  
3 contractor has definitively declined or ignored the requests to meet with the board  
4 of directors of the association.

5       4. The association has otherwise satisfied all of the pre-action requirements  
6 for a claimant to commence an action under this section.

7       (f) At least 3 working days in advance of any vote to commence an action by an  
8 association to recover damages resulting from construction defects in any of the  
9 common elements or limited common elements of a condominium, the attorney  
10 representing the association shall provide to each unit's owner a written statement  
11 that includes, in reasonable detail all of the following:

12       1. The construction defects and damages or injuries to the common elements  
13 or limited common elements.

14       2. The cause of the construction defects, if the cause is known.

15       3. The nature and the extent that is known of the damage or injury resulting  
16 from the construction defects.

17       4. The location of each construction defect within the common elements or  
18 limited common elements, if known.

19       5. A reasonable estimate of the cost of the action, including reasonable attorney  
20 fees and costs, expert fees, and the costs of testing.

21       6. All disclosure that the unit owner is required to make upon the sale of the  
22 unit.

23       (g) An association or an attorney for an association may not employ a person  
24 to perform destructive tests to determine any damage or injury to a unit, common

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1 element, or limited common element caused by a construction defect unless all of the  
2 following are true:

3 1. The person has expertise in the testing.

4 2. The association has obtained the prior written approval of each unit's owner  
5 whose unit or interest in the common element or limited common element will be  
6 affected by the testing.

7 3. The person performing the tests has provided a written schedule for repairs.

8 4. The person performing the tests is required to repair all damage resulting  
9 from the tests in accordance with state laws and applicable local ordinances.

10 5. The association or the person so employed obtains all permits required to  
11 conduct the tests and to repair any damage resulting from the tests.

12 6. Reasonable prior notice and opportunity to observe the tests is given to the  
13 contractor against whom an action may be brought as a result of the tests.

14 (h) An association may commence an action only upon a vote or written  
15 agreement of the owners of the units to which at least a majority of the votes of the  
16 members of the association are allocated. In such a case, the association shall  
17 provide written notice to the owner of each unit of the meeting at which the  
18 commencement of an action is to be considered or action is to be taken at least 15  
19 working days before the meeting.

20 (i) The board of directors of an association may, without giving notice to the  
21 units' owners, employ a contractor and other persons necessary to make immediate  
22 repairs to a unit or common element within the condominium as are required to  
23 protect the health and safety of the units' owners.

24 (8) (9) CONTRIBUTION. (a) A contractor may ~~not~~ seek contribution from a supplier  
25 for a claim that a claimant makes against the contractor unless the contractor

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## SECTION 2

*if providing*  
1 provides the supplier with <sup>a</sup> written notice of the claimant's claim and the  
2 contribution claim within 5 working days after the contractor's receipt of the claim.

3 ~~The contractor shall explain the contribution claim in sufficient detail to explain the~~  
4 ~~include in the written notice a description~~  
5 ~~nature and results of the alleged construction defect. The contractor shall provide~~

6 the supplier all evidence the contractor knows or possesses, including expert reports,  
7 photographs, electronic mail, and videotapes that depict the nature and cause of the  
8 alleged construction defect. In addition, the contractor shall provide to the supplier  
9 any evidence discoverable under ch. 804 that depicts the nature and cause of the  
10 alleged construction defect, including expert reports, photographs, and videotapes.

11 The evidence provided to the supplier shall include all of the evidence provided to the  
12 contractor by the claimant. The contractor may not later use evidence in an action

under this section that the contractor withholds or fails to produce *insert 16-12 new 16-12*

13 (b) Within 15 working days after a supplier has received notice that a contractor  
14 is seeking contribution under par. (a), the supplier <sup>shall</sup> ~~may~~ serve the contractor with a  
15 written response that ~~rejects the contribution claim,~~  
16 or by both payment and repair without inspection, or ~~that~~ offers to inspect the  
17 dwelling that is the subject of the contribution claim. *insert 16-17* The contractor shall forward  
18 the supplier's response to the claimant. The supplier and contractor shall use their  
19 best efforts to coordinate their responses to claims and contribution claims.

20 (c) If the supplier wholly rejects the contribution claim and will neither remedy  
21 the alleged construction defect nor settle the claim, or does not respond to the  
22 contractor's notice of contribution claim within the time under par. (b), the contractor  
23 may bring an action against the supplier for the claims described in the notice of  
24 contribution claim without further notice.



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(c)  
(1) (d) If the contractor rejects a settlement offer made by the supplier, the contractor shall provide written notice of the contractor's rejection to the supplier and, if the supplier is represented by legal counsel, the supplier's attorney. The notice shall include the specific factual and, if known, legal reasons for the contractor's rejection of the supplier's proposal or offer. If the contractor believes that the settlement offer omits reference to any portion of the claim, or was unreasonable, the contractor shall in its written notice include those items that the contractor believes were omitted and set forth in detail all reasons why the contractor believes the settlement offer is unreasonable. In any subsequent action in which the contractor asserts that the settlement offer was unreasonable, the contractor may not raise any reasons that were not included in its response to the supplier.

(d)  
(2) (e) If a supplier proposes to inspect the dwelling that is the subject of the contribution claim, the contractor and claimant shall, within 15 working days after receiving the supplier's proposal, provide the supplier and its agents, experts, and consultants prompt and complete reasonable access to the dwelling to inspect the dwelling, document any alleged construction defects, and perform any testing required to evaluate fully the nature, extent, and cause of the claimed construction defects and the nature and extent of any repairs or replacements that may be necessary to remedy them. If destructive testing is required, the supplier shall give the contractor and claimant and all persons on whom a notice of claim or contribution claim has been served advance notice of the testing at least 5 working days before commencement of the testing and shall, after completion of the testing, return the dwelling to its pre-testing condition. If any inspection or testing reveals a condition that requires additional testing to allow the supplier to evaluate fully the nature, cause, and extent of the construction defect, the supplier shall provide notice to the

at the supplier's expense

## SENATE BILL 448

## SECTION 2

contractor and claimant and all persons on whom a notice of claim or contribution claim has been served of the need for the additional testing and the contractor and claimant shall provide access under this paragraph. If a claim is asserted on behalf of the contractor of multiple dwellings, or multiple owners of units within a multifamily complex, then the supplier shall be entitled to inspect each of the dwellings or units. The contractor and claimant shall ~~either~~ provide a specific day for the inspection upon reasonable notice for an inspection or require the supplier to request in writing a day, at least 3 working days before the inspection.

(e) (f) Within 10 working days following completion of the inspection and receipt of all testing results under par. (d) the supplier ~~may~~ <sup>shall</sup> serve on the contractor any of the following:

1. A written offer to remedy fully or partially the construction defect at no cost to the contractor. The offer shall include a description of any additional construction necessary to remedy the construction defect and an anticipated timetable for the completion of the construction.

2. A written offer to settle the claim by monetary payment.

3. A written offer including a combination of repairs and monetary payment.

4. A written statement that the supplier will not proceed further to remedy the construction defect.

(f) (g) If a contractor accepts a supplier's offer made under par. (e) within 15 working days after receipt of the offer, or if the offer is deemed accepted under par. (h) and the supplier does not proceed to make the monetary payment or remedy the construction defect within the agreed timetable, the contractor may bring an action against the supplier for the claim described in the notice of claim without further notice. The claimant may also file the supplier's offer and contractor's acceptance

## SENATE BILL 448

1 in the circuit court action, and the offer and acceptance creates a rebuttable  
2 presumption that a binding and valid settlement agreement has been created and  
3 should be enforced by the court.

4 (g)(h) If a contractor receives a written statement that the supplier will not  
5 proceed further to remedy the construction defect, the contractor may bring an action  
6 against the supplier for the claim described in the notice of claim without further  
7 notice.

8 (h)(i) If the contractor rejects the offer made by the supplier to remedy the  
9 construction defect or to settle the claim by monetary payment or a combination of  
10 each, the contractor shall serve written notice of the contractor's rejection on the  
11 supplier. The notice shall include the ~~specific factual and, if known, legal~~ reasons for  
12 the contractor's rejection of the supplier's offer. If the contractor believes the  
13 supplier's settlement offer is unreasonable, the contractor shall set forth ~~in detail~~ <sup>the</sup> all  
14 reasons why the claimant believes the settlement offer is unreasonable. In any  
15 subsequent action in which the contractor asserts that the settlement offer was  
16 unreasonable, the contractor may not raise any new reasons unless the contractor  
17 later discovers significant information.

18 (i)(j) Upon receipt of a contractor's rejection and the reasons for the rejection, the  
19 supplier ~~may~~ <sup>shall</sup> within 10 working days of receiving the rejection, make a  
20 supplemental offer of repair or monetary payment to the contractor.

21 (j)(k) If the contractor rejects the supplemental offer made by the supplier to  
22 remedy the construction defect or to settle the claim by monetary payment or a  
23 combination of each, the contractor shall serve written notice of the contractor's  
24 rejection on the supplier. The notice shall include the ~~specific factual and, if known,~~  
25 ~~legal~~ reasons for the contractor's rejection of the supplier's supplemental settlement

## SENATE BILL 448

## SECTION 2

offer. If the contractor believes the supplier's supplemental settlement offer is unreasonable, the contractor shall set forth in detail <sup>the</sup> all reasons why the contractor believes the supplemental settlement offer is unreasonable. In any subsequent action in which the contractor asserts that the settlement offer was unreasonable, the contractor may not raise any reasons that were not included in its response to the supplier.

(k) (1) If a contractor rejects a reasonable offer, including any reasonable supplemental offer, made as provided under this subsection or does not permit the supplier to repair the construction defect pursuant to an accepted offer of settlement, the contractor may not recover an amount in excess of the fair market value of the offer of settlement, or the actual cost of the repairs made, whichever is less, or the amount of a monetary offer of settlement. For purposes of this paragraph, the trier of fact shall determine the reasonableness of an offer of settlement. If the contractor has rejected a reasonable offer, including any reasonable supplemental offer, and any other law allows the contractor to recover costs and attorney fees, then the contractor may recover no costs or attorney fees incurred after the date of its rejection.

(L) (m) A contractor accepting the offer of the supplier to remedy a construction defect shall do so by serving the supplier with a written notice of acceptance within a reasonable period of time after receipt of the supplier's settlement offer, but no later than 15 working days after receipt of the offer. If no response is served upon the supplier within the 15-working day period, then the offer shall be deemed <sup>rejected</sup> accepted.

(m) (n) If a contractor accepts a supplier's offer to repair a construction defect described in a notice of claim, the contractor shall provide the supplier and its agents, experts, and consultants <sup>reasonable</sup> prompt and unfettered access to the dwelling to perform and complete the construction by the timetable stated in the settlement offer.

## SENATE BILL 448

*contractor*  
(1) (a) A ~~person~~ who is seeking contribution from a supplier and who elects to  
(2) inspect a dwelling under sub. (3) shall send to the supplier written notice by certified  
3 mail of the inspection date and dwelling address, and whether destruction testing  
4 is contemplated, at least 5 working days before the inspection.

(9) (10) *Application to others.* This section does not apply to a contractor's or supplier's right to seek  
6 contribution, indemnity, or recovery against any party other than a supplier for a  
7 claim made against a contractor or supplier.

(10) (11) HOMEOWNER REPAIRS. Without giving notice under this section, a  
9 homeowner may make immediate repairs to a dwelling to protect the health or safety  
10 of its occupants.

(11) (12) *Brochure* The department of commerce shall prepare ~~a draft of~~ a brochure  
12 explaining the process under this section and shall provide that ~~does~~ *brochure* to contractors.

Contractors shall provide a copy of this brochure to any person who purchases a  
14 dwelling from the contractor or who has a contractor remodel a dwelling or  
15 manufactured home.

**SECTION 3. Initial applicability.**

(1) This act first applies to actions commenced on the effective date of this  
18 subsection.

**SECTION 4. Effective date.**

(1) This act takes effect on the first day of the 6th month beginning after  
21 publication.

(END)

*D-Note*

**2005-2006 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRBs0466/?ins  
RPN:.....

1 insert 3-3:

2 (a) "Consumer" means the owner, tenant, or lessee of a dwelling, or an  
3 association or other entity with control over the common areas appurtenant to a  
4 dwelling, who contracts with a contractor to construct or remodel a dwelling.

5

6 insert 3-11:

7 (c) "Dwelling" means any premises or portion of a premises that is used as a  
8 home or a place of residence and that part of the lot or site on which the dwelling is  
9 situated that is devoted to residential use. "Dwelling" includes other existing  
10 structures on the immediate residential premises such as driveways, sidewalks,  
11 swimming pools, terraces, patios, fences, porches, garages, and basements.

12

13 insert 3-13:

14 (d) "Remodel" means to alter or reconstruct a structure. "Remodel" does not  
15 include maintenance work.

16

17 insert 3-18:

18 , or, if the parties enter into an oral contract, as soon as reasonably possible, but  
19 before commencing any work to construct or remodel a dwelling,

20

21 insert 4-15

22 (b) "Claim" means a request or demand to remedy a construction defect caused  
23 by a contractor or supplier related to the construction or remodeling of a dwelling.

1

2 insert 4-17:

3 ~~no~~ the owner, tenant, or lessee of a dwelling, or an association, such as a  
4 condominium association or homeowners association, who has standing to sue a  
5 contractor or supplier regarding a construction defect<sup>e</sup>

6

7 insert 4-21:

8 (d) "Construction defect" in those cases when the contractor or supplier has  
9 provided a warranty shall mean the definition of "defect" in the warranty. In all other  
10 cases, "construction defect" means a deficiency in the specifications, planning,  
11 supervision, construction, or remodeling of a dwelling that results

12

13 insert 5-7:

14 (f) "Dwelling" means any premises or portion of a premises that is used as a  
15 home or a place of residence and that part of the lot or site on which the dwelling is  
16 situated that is devoted to residential use. "Dwelling" includes other existing  
17 structures on the immediate residential premises such as driveways, sidewalks,  
18 swimming pools, terraces, patios, fences, porches, garages, and basements.

19 (g) "Remodel" means to alter or reconstruct a structure. "Remodel" does not  
20 include maintenance work.

21

22 insert 5-18:

23 ~~no~~ comply with the requirements of sub. (2) (a) and the contractor or supplier  
24 establishes that the claimant was provided the notice and brochure under s. 101.148  
25 (2),

1 insert 5-20:

2 *no #* If the claimant files an action but fails to comply with the requirements of sub.  
3 (2) (a) and the contractor *or* supplier cannot establish that the claimant was provided  
4 the notice and brochure under s. 101.148 (2), the circuit court shall stay the action  
5 and order the parties to comply with the requirements of sub. (2) (a) and s. 101.148  
6 (2). *5-20 A attached*

8 insert 6-2:

9 *no #* and shall offer the ~~contractor or supplier~~ the opportunity to correct the  
10 construction defect.

12 insert 6-7:

13 *no #* The claimant shall include in the notice of claim a description of the alleged  
14 construction defect and include a comprehensive description of all evidence that the  
15 claimant knows or possesses, including expert reports, that substantiates the nature  
16 and cause of the alleged construction defect.

18 insert 6-15:

19 If the contractor rejects the claim, the contractor shall state in the written  
20 response to the claim the reason for rejecting the claim and include a comprehensive  
21 description of all evidence the contractor knows or possesses, including expert  
22 reports, that substantiates the reason for rejecting the claim. The contractor shall  
23 also include in the written response to the claim any settlement offer received from  
24 a supplier.

25



1 insert 8-19:

2 ~~not~~ , and shall state in the written response to the claim the reason for rejecting the  
3 claim and include a comprehensive description of all evidence the contractor knows  
4 or possesses, including expert reports, that substantiates the reason for rejecting the  
5 claim. The contractor shall also include in the written response to the claim any  
6 settlement offer received from a supplier.

8 insert 10-15:

9 ~~not~~ However, if the trier of fact determines that the contractor did not make a  
10 reasonable offer or supplemental offer or comply in good faith with the requirements  
11 of this subsection, the claimant may pursue claims under any other law ~~the~~ <sup>that</sup> allows  
12 the claimant to recover punitive damages, costs, and attorney fees.

14 insert 11-14:

15 (q) If the claimant has served a contractor with a notice of claim relating to a  
16 construction defect and the contractor has rejected or not responded to the claim and  
17 the claimant knows that the contractor has not notified a supplier of the claim, the  
18 claimant shall, before filing an action against the supplier for a construction defect,  
19 serve the supplier with a copy of the notice of claim.

21 insert 16-12:

22 ~~not~~ and a comprehensive description of all evidence that the claimant has provided  
23 to the contractor, including expert reports, that substantiates the nature and cause  
24 of the alleged construction defect. Notwithstanding any other provision of this  
25 section, failure of the contractor to provide the supplier notice of a contribution claim

see attached  
new 16-12

1 does not prohibit the contractor from commencing an action for contribution against  
2 the supplier if an action is filed by a claimant.

3  
4 insert 16-17:

5 *not* If the supplier rejects the contribution claim, the supplier shall state in the  
6 written response to the claim the reason for rejecting the claim and include a  
7 comprehensive description of all evidence the supplier knows or possesses, including  
8 expert reports, that substantiates the reason for rejecting the claim.

**Nelson, Robert P.**

**From:** Robert Procter [RProcter@axley.com]  
**Sent:** Thursday, January 19, 2006 11:16 AM  
**To:** Nelson, Robert P.  
**Cc:** Jerry Deschane; Brad Boycks; richard chandler; Charles V. Sweeney  
**Subject:** Right to Repair legislation

Dear Mr. Nelson:

We are requesting the following revisions to the legislation in addition to those provided previously.

Section 895.07(3), page 5, line 23 should state: "shall serve written notice of claim under sub. (2) on the contractor and provide the opportunity to repair the alleged defect" *claimant* (8) *not*

Section 895.07(2), page 5, line 20, please add the following language to the end of the section: "Before filing an action against a supplier seeking contribution for a claim that a claimant has served notice on a contractor, the contractor shall serve the supplier with a contribution claim under sub. (9). If the contractor files an action against a supplier but fails to serve the notice of claim, the circuit court shall stay the action until the contractor has complied with the requirements of this subsection and sub. (9)." (8)

Section 895.07(9)(a) should be deleted and restated with the following language: "(9) Contribution. (a) A contractor may not seek contribution from a supplier for a claim that a claimant makes a contractor unless the contractor provides the supplier with a written notice of the claimant's claim and the contribution claim within 5 working days after the contractor's receipt of the claim, except that a contractor may make a contribution claim later than 5 days after the contractor's receipt of the initial claim as long as the contractor has not taken any action to repair the defect, has not performed destructive testing, has not authorized the claimant to take any action to repair the defect, has not otherwise interfered with or altered the property that is the subject of the claim, and has not in any other way taken steps that would preclude a supplier's ability to offer to remedy the defect by making repairs."

Thank you for your assistance. Please call me with any questions or concerns.

Sincerely,

Robert C. Procter  
 (608) 283-6762

Unless otherwise indicated or obvious from the nature of this transmittal, the information contained in this transmission is confidential and protected from disclosure by the attorney-client privilege, or by attorney work-product doctrine, or by various privacy laws, or by virtue of it being proprietary in nature. This transmission is intended for the exclusive use of the named recipient. If you are not the named recipient, or the employee or agent responsible to deliver it to the named recipient, you are hereby notified that any use, copying, disclosure, dissemination, or other distribution of the information transmitted herewith is strictly prohibited and you may be subject to legal restrictions or sanctions. If you have received this communication in error or are not sure whether it is confidential, please immediately notify us by telephone (collect) at (608) 257-5661; and return the original message to us at the above address or destroy all copies. Thank you.

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or

LRBS0466/Pldn  
RPN:lgf

D-N Date

Fri 20th I made mostly minor changes for clarity and consistency. However, I did make the following changes that you should review to see if those changes are OK? :

1. I changed the definition of "dwelling" slightly.
2. I removed all references to manufactured homes because they are just one kind of a dwelling. They were not treated any differently than other types of dwellings in the bill.
3. I changed "denying the claim" to "rejecting the claim" throughout the bill.
4. I added the option of rejecting a claim in subs. (2) (b) and (8) (b).

✓ 5. I reversed s. 895.07 (2) and (3) because the claimant has to do certain things before going to court. - This change fixes the chronology of the bill.

6. I required the court to order the parties to comply with both ss. 101.148 (2) and 895.07 (2) (a).

7. I added a limit on the claimant's requirement to <sup>serve</sup> the supplier in s. 895.07 (2) (g) - a copy of the notice, but only if the claimant has knowledge of the contractor's failure to notify the supplier.

8. There were conflicting instructions <sup>regarding</sup> (2) (j). See your instructions ~~regarding~~ (2) (j) and (2) (k). <sup>regarding</sup> s. 895.07

RPN

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRBs0466/P1dn  
RPN:kjf:pg

January 20, 2006

I made mostly minor changes for clarity and consistency. However, I did make the following changes that you should review to see if those changes are OK:

1. I changed the definition of "dwelling" slightly.
2. I removed all references to manufactured homes because they are just one kind of a dwelling. They were not treated any differently than other types of dwellings in the bill.
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5. I reversed s. 895.07 (2) and (3) because the claimant has to do certain things before going to court. This change fixes the chronology of the bill.
6. I required to the court to order the parties to comply with both ss. 101.148 (2) and 895.07 (2) (a).
7. I added a limit on the claimant's requirement to serve the supplier in s. 895.07 (2) (q) a copy of the notice, but only if the claimant has knowledge of the contractor's failure to notify the supplier.
8. There were conflicting instructions regarding s. 895.07 (2) (j). See your instructions (27) and (28).

Robert P. Nelson  
Senior Legislative Attorney  
Phone: (608) 267-7511  
E-mail: robert.nelson@legis.state.wi.us



AXLEY BRYNELSON, LLP

## MEMORANDUM

TO: Jerry Deschane, Wisconsin Builders Association  
Brad Boycks, Wisconsin Builders Association

FROM: Charles V. Sweeney  
Robert C. Procter

DATE: January 17, 2006

RE: Right to Repair Legislation  
Our File: 12557.56638

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This memorandum is intended to form the basis of the memorandum to be sent to the legislative drafting attorney setting forth the changes in the Right to Repair Legislation (the "Legislation") that are to be incorporated into an amendment. The memorandum incorporates the vast majority of comments and concerns presented by the Department of Agriculture and Consumer Protection ("DATCP") and the Wisconsin Realtors Association (the "WRA"). The page and line numbers refer to Senate Bill 448. All changes are in bold and comments are in regular font.

(1) 101.148(1)(a) should be changed to state:

**"Consumer" means an owner of a dwelling, a tenant or lessee of a dwelling or an association or other entity with control over the common areas appurtenant to a dwelling that contracts with a contractor to construct a dwelling, remodel a dwelling, or to remodel a manufactured home.**

The term "Claimant" should be changed to "Consumer" for the purposes of the notice provision because it may be impossible to give every potential Claimant notice as that term is defined. The Contractor should only be required to give the notice to the person he enters into a contract with and not to every potential claimant (i.e., subsequent homeowners) because he or she will not know who all potential claimants are when giving the notice. Please note that the legislation is set up that if a "Claimant" does not receive the required notice, then the Court does not dismiss the lawsuit but only "stays" the lawsuit until the Right to Repair procedures are followed. The result is the acknowledgement that there may be some potential "Claimants" (i.e., subsequent home buyers) that a Contractor cannot provide a notice.

- (2) 101.148(1)(b) should be changed to state:

**"Contractor"** means a person that enters into a contract, whether written or oral, with a Consumer to construct a dwelling, to remodel a dwelling or to remodel a manufactured home.

- (3) 101.148(1)(c) should be changed to state:

**"Dwelling"** means any residential or non-commercial premises used, in whole or in part, as a home or place of residence by any natural person, whether or not a single- or multi-unit structure, and that part of the lot or site on which it is situated and which is devoted to the residential use of the structure and includes all appurtenant structures. The term extends to other existing structures on the immediate residential premises even though they are not used for residential purposes such as driveways, sidewalks, swimming pools, terraces, patios, fences, porches, garages and basements.

- (4) 101.148(1)(e) should be changed to state:

**"Remodel"** means to alter or reconstruct a structure. Remodel does not include maintenance work.

- (5) 101.148(2)(a) should be changed to state:

**Notice required at time of contracting.** (a) Prior to entering into a written contract, or in cases of an oral contract as soon as reasonably possible, but prior to commencing any work to construct a dwelling, to remodel a dwelling, or to remodel a manufactured home, the contractor shall give the consumer a copy of the brochure prepared under s. 895.07(12) and a notice worded substantially as follows:

- (6) Section 895.07(1)(b) should be changed to state:

**"Claimant"** means an owner of a dwelling, a tenant or lessee of a dwelling, or an association such as a condominium association or homeowners association that has standing to sue a contractor or supplier regarding a construction defect.

- (7) Section 895.07(1)(c) should be created to state:

**"Claim"** means a request or demand to remedy any construction defect caused by a contractor or supplier relating to the construction of a dwelling, the remodeling of a dwelling or the remodeling of a manufactured home.

- (8) Section 895.07(1)(c), which was the definition for "Construction Defect", should become Section 895.07(1)(d) and the subsequent subsections re-lettered. The definition for Construction Defect should be deleted, and the following definition inserted:



**“Construction defect” means a deficiency in the specifications, planning, supervision, construction, or remodeling of a dwelling or in the remodeling of a manufactured home that results from any of the following:**

**(1) Defective Material;**

**(2) Violation of applicable codes;**

**(3) Failure to follow accepted trade standards for workmanlike construction; or**

**(4) In those instances where the contractor or supplier has provided a warranty, the definition of the term “defect” under the warranty shall govern any claim made under the warranty.**

**(9) Section 895.07(1)(e) should be changed to state:**

**“Serve” or “service” means personal service or delivery by certified mail, return receipt requested, to the last-known address of the addressee.**

**(10) Section 895.07(1)(f) should be changed to state:**

**“Working day” means any day except Saturday, Sunday, and holidays designated in s. 230.35(4) (a).**

**(11) Section 895.07(1)(g) should be changed to state:**

**The terms “contractor,” “dwelling,” “manufactured home,” “remodel” and “supplier” shall have the meaning given under s. 101.148(1).**

**(12) Section 895.07(2), should be changed at page 5, line 17, to state:**

**If the claimant files an action but fails to comply with the requirements of this subsection and the contractor or supplier can establish that the claimant was provided the notice and brochure pursuant to s. 101.148(2), the circuit court shall dismiss the action without prejudice, and the action may not be re-filed until the claimant has complied with the requirements of this subsection. If the claimant files an action but fails to serve the notice of claim and the contractor or supplier cannot establish that the claimant was provided notice pursuant to s. 101.148(2), the action shall be stayed and the parties ordered to comply with the requirements of this subsection.**

**(13) Section 895.07(3)(a) should be revised at page 5, lines 23-25, to state:**

**The notice of claim shall state that the claimant asserts a construction defect claim or claim.**

The revision deletes the statement "and is providing notice under this paragraph" pursuant to DATCP's comments.

- (14) Section 895.07(3)(a) should be revised at page 6, line 2, in the following manner:

The sentence on line 2 beginning with phrase "The claimant shall provide" and the sentence on line 5 beginning with "In addition, the claimant" should be deleted and replaced with the following statement:

**The claimant shall include in its notice of claim a description of the alleged construction defect and include a comprehensive description of all evidence the claimant knows or possesses, including expert reports, that substantiates the nature and cause of the alleged construction defect.**

- (15) Section 895.07(3)(b), at page 6, line 10, the word "may" should be changed to "**shall**".

- (16) Section 895.07(3)(b), at page 6, line 15, the following language should be added:

**If the contractor refuses to settle the claim, the contractor shall state in its written response the reason for refusing to settle the claim and include a comprehensive description of all evidence the contractor knows or possesses, including expert reports, that substantiates the reason for refusing to settle the claim. The contractor shall also include in its/her/his response any settlement offer received from a supplier.**

- (17) Section 895.07(3)(c), should be deleted, and the section you be renumbered accordingly (section 895.07(9) sets forth procedures for the suppliers making (3)(c) redundant).

- (18) Section 895.07(3)(c), at page 6, line 20, the following statement should be inserted after the sentence, which ends "subject of the contribution claim":

- (19) Section 895.07(3)(d), at page 6, line 24, the word "**wholly**" should be deleted.

- (20) Section 895.07(3)(e), at page 7, line 5, should read:

**The notice shall include the specific reasons . . .** (deleting the words "factual and, if known, legal").

- (21) Section 895.07(3)(e), at page 7, line 9, should state:

**Were omitted and set forth the . . .** (deleting the words "in detail all")

- (22) Section 895.07(3)(f), at page 7, line 15, should state:

**and consultant's reasonable access to the dwelling to inspect the dwelling . . .**  
(deleting the words "prompt and complete")

- (23) Section 895.07(3)(f), at page 7, line 23, the following phrase should added to the sentence, which ends "pre-testing condition":

**pre-testing condition within a reasonable time after completion of the testing at the contractor's sole expense.**

- (24) Section 895.07(3)(g), at page 8, line 10, the word "may" should be changed to "shall".
- (25) Section 895.07(3)(g), at page 8, line 19, the following phrase should be added to the sentence:

**the construction defect, and shall state in its written response the reason for denying the claim and include a comprehensive description of all evidence the contractor knows or possesses, including expert reports, that substantiates the reason for denying the claim. The contractor shall also include in its/her/his response any settlement offer received from a supplier.**

- (26) Section 895.07(3)(j), at page 9, line 12, should state:

**The specific reasons . . . (deleting the words "factual and, if known, legal").**

- (27) Section 895.07(3)(k), at page 9, line 17, the sentence should be revised to state:

**Contractor shall, within 5 working days after receiving the rejection, make a supplemental offer of repair or monetary payment to the claimant or provide a written notice that no such offer will be made.**

- (28) Section 895.07(3)(k), at page 9, line 18, should state:

**supplemental offer of repair or monetary payment to the claimant or deny the claim.**

- (29) Section 895.07(3)(l), at page 9, line 23, should state:

**The notice shall include the specific reasons . . . (deleting the words "factual and, if known, legal").**

- (30) Section 895.07(3)(m), at page 10, lines 6-7, should state:

**If a claimant rejects a reasonable offer or reasonable supplemental offer or fails to comply in good faith with the requirements of this subsection . . .**

- (31) Section 895.07(3)(m), at page 10, lines 12-15, should state:

**If the claimant has rejected a reasonable offer or reasonable supplemental offer or fails to comply in good faith with the requirements of this subsection and any other law allows the claimant to recover punitive damages, costs and attorney fees, then the claimant shall not be entitled to recover any punitive damages, costs or attorney fees incurred after the date of its rejection under such laws; however, if the trier of fact determines that the contractor did not make a reasonable offer or supplemental offer or comply in good faith with**

the requirements of this subsection, the claimant shall be entitled to pursue claims under any other law that allows the claimant to recover punitive damages, costs and attorney fees.

- (32) Section 895.07(3)(n), at page 10, line 18-19, delete the following: "a reasonable period of time after receipt of the contractor's settlement offer, but no later than".
- (33) Section 895.07(3)(n), at page 10, line 21, should state "rejected" (deleting the word "accepted").
- (34) Section 895.07(3)(o), at page 11, line 3, should state "reasonable access" (deleting the words "prompt and unfettered access")
- (35) Section 895.07(3)(r), at page 11, line 14, create subsection (r) to state:

**In those cases where a claimant has served a contractor with a notice of claim relating to a construction defect and the contractor has rejected or not responded to the claim and the contractor has not notified a supplier of the claim, the claimant shall, before filing an action against the supplier for a construction defect, serve the supplier with notice of the claim pursuant to s. 895.07(3)(a) and otherwise comply with the requirements of this section.**

- (36) Section 895.07(4), at page 11, line 15, delete the entire subsection 4.
- (37) Section 895.07(7), at page 12, line 18, the term "insurance" should be deleted.
- (38) Section 895.07(7), at page 12, line 21, a period should be inserted after the word "prejudice", and the remaining part of the paragraph should be deleted.
- (39) Section 895.07(8)(e) should be amended to state:

**An association may bring an action against a contractor or supplier to recover damages that result from construction defects in any of the common elements or limited common elements of a condominium, as defined in ss. 703.02(2) and (10), or to the extent it has standing to sue on behalf of its members.**

- (40) Section 895.07(8)(e)(1) up to Section 895.07(9) should be deleted.
- (41) Section 895.07(9)(a) should be deleted and replaced with the following language:

**Contribution. (a) A contractor may seek contribution from a supplier for a claim that a claimant makes against the contractor by providing written notice of the claimant's claim and the contribution claim within 5 working days after the contractor's receipt of the claim. The contractor shall include in its notice a description of the alleged construction defect and include a comprehensive description of all evidence the claimant knows or possesses, including expert reports, that substantiates the nature and cause of the**



**alleged construction defect. Notwithstanding any other provision in this section, failure to provide notice of a contribution claim to a supplier shall not prohibit the contractor from commencing an action for contribution against a supplier resulting from an action filed by a claimant.**

- (42) Section 895.07(9)(b), page 16, line 14, the term “may” should be revised to state “shall”.
- (43) Section 895.07(9)(b) page 16, line 17, should be revised to include the following statement after sentence that ends with the phrase “contribution claim.”

**If the supplier refuses to settle the claim, the supplier shall state in its written response the reason for denying the claim and include a comprehensive description of all evidence the supplier knows or possesses, including expert reports, that substantiates the reason for denying the claim.**

- (44) Section 895.07(9)(c) should be deleted. This section is unnecessary because the contractor already has the right to bring the claim if he/she/it is sued by a claimant.
- (45) Section 895.07(9)(d), page 17, line 3, should be deleted starting at the word “and” through the end of the sentence.
- (46) Section 895.07(9)(d), page 17, line 4, the phrase “specific factual and, if known, legal” should be deleted.
- (47) Section 895.07(9)(d), page 17, line 8, the phrase “in detail” should be deleted, and the word “the” inserted.
- (48) Section 895.07(9)(d), page 17, line 9, the sentence beginning with the phrase “In any subsequent action” should be deleted.
- (49) Section 895.07(9)(e), page 17, line 15, the phrase “prompt and complete” should be deleted and replaced with the word “reasonable”.
- (50) Section 895.07(9)(e), page 17, line 23, the following phrase should be inserted after the phrase “pre-testing condition”:

**within a reasonable time after completion of the testing at the supplier’s sole expense.**

- (51) Section 895.07(9)(e), page 18, lines 7 – 8, the phrase “or require the supplier to request in writing a day, at least 3 working days before inspection” should be deleted.
- (52) Section 895.07(9)(f), page 18, line 10, the word “may” should be changed to “shall.”
- (53) Section 895.07(9)(g), should be deleted and restated as follows:

**If a contractor accepts a supplier’s offer made under par. (f) within 15 working days after receipt of the offer, and the supplier does not proceed to make the monetary payment or**

remedy the construction defect within the agreed timetable, the contractor may bring an action against the supplier for the claim described in the notice of claim without further notice.

- (54) Section 895.07(9)(i), page 19, line 11, the phrase "specific factual and, if known, legal" should be deleted.
- (55) Section 895.07(9)(i), page 19, line 13, the phrase "in detail all" and replaced with the word "the".
- (56) Section 895.07(9)(i), page 19, lines 14 – 17, the sentence beginning with the phrase "in any subsequent action . . ." should be deleted.
- (57) Section 895.07(9)(j), page 19, line 19, the word "may" should be changed to "shall."
- (58) Section 895.07(9)(k), page 19, lines 24-25, the phrase "specific factual and, if known, legal" should be deleted.
- (59) Section 895.07(9)(k), page 20, line 2, the phrase "shall set forth in detail" should be replaced with the word "the."
- (60) Section 895.07(9)(k), page 20, lines 3 through 6, the sentence beginning with the phrase "in any subsequent action" should be deleted.
- (61) Section 895.07(9)(m), page 20, line 21, the word "accepted" should be changed to "rejected".
- (62) Section 895.07(9) (n), page 20, line 24, the phrase "prompt and unfettered" should be changed to "reasonable."
- (63) Section 895.07(9) (o), page 21, line 1, the word "person" should be changed to "contractor."
- (64) Section 895.07(12), page 21, line 13, the sentence should be deleted because it is redundant. Section 101.148(2) requires that the brochure be given to consumers.

I have been reading this draft over and have the following concerns that are more than minor:

1. The definition of "remodel" refers to structures, not dwellings.
2. Why is sub. (2) (d) before sub. (2) (f)? That seems backward in time.
3. Is sub. (2) (d) the same as sub. (2) (i)? Sub. (2) (i) has a 15 day limit, sub. (2) (d) does not.
4. What are these "units" in sub. (2) (e)? Dwellings?
5. In sub. (2) (f) there is no time frame for receiving the test results.
6. Should su. (2) (m) go before sub. (2) (g). Again, timing seems to say yes.
7. Are sub. (2) (g) and (m) the same?

Bob N

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**Nelson, Robert P.**

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**From:** richard chandler [rgcwis@charter.net]  
**Sent:** Sunday, January 22, 2006 12:58 PM  
**To:** Nelson, Robert P.; Robert Procter  
**Cc:** Brad Boycks  
**Subject:** Re: Right to Repair legislation

Bob Nelson raises some good points here. Here are my reactions. These suggestions do not make substantive changes to the bill; all of them are designed to clarify what we all intend and make the bill workable.

1. On page 2, line 6 and page 4, line 6, "structure" should be changed to "dwelling."
2. Sub. (2)(d) is ahead of sub. (2)(f) because (2)(d) applies where there's no inspection. We should probably add to (2)(d) a provision that the claimant has 15 days to respond to the contractor's offer. We should perhaps add to (2)(d) a provision that a non-response is deemed to be a rejection. Also, we should probably move the language from page 7, lines 4-15 to (2)(b), where it would replace the language on page 5, lines 6-12. The language on page 7 is more detailed and makes things more clear. (Note: I've suggested a few changes to the language on page 7 in item 8 below to further improve the clarity.) The language on page 5, lines 6-12 could be used to replace the more detailed language on page 7, lines 4-15, or the more detailed language could be retained on page 7.
3. (2)(d) and (2)(i) should be the same, except one applies after the initial offer and one applies after an offer made after an inspection. (2)(d) should have a 15 day limit.
4. On page 6, lines 20-22, the following language can be deleted: "or multiple owners of units within a multifamily complex," and "or units."
5. I don't think we need a time frame for receiving the test results under (2)(f). The contractor has to arrange to get the results in time to respond to the claimant within 10 days after the inspection.
6. I don't think (2)(m) should go before (2)(g). (2)(g) applies where there's an acceptance of a contractor's offer after an inspection. (2)(m) applies where there's an acceptance of a contractor's offer after there's been a rejection of a contractor's offer and then a supplemental offer. However, on page 7, lines 17-18, the following language should be deleted: "or if the offer is deemed accepted under par. (m)."
7. I think (2)(g) and (2)(m) are different. See the comment in item 6 above. However, I think we might want to add language in (2)(d), (2)(g) and (2)(i) that says that a non-response is deemed to be a rejection. (2)(m) says this on page 9, lines 21-22.
8. Here's one additional comment: I would suggest making the following changes for the sake of clarity:  
 Page 7, line 10: After "contractor," insert "rejects the claim and."  
 Page 7, line 11: After "defect," insert a period, delete "and," and insert "The contractor."  
 Page 7, line 14: Before "The contractor," insert "5." to create a new subsection.

Let me know what you think. Again, I think a direct meeting with Bob Nelson on Monday to discuss these items would be helpful in resolving things as quickly as possible.

----- Original Message -----

**From:** Nelson, Robert P.  
**To:** Robert Procter ; Wieckert, Steve ; Olsen, Luther  
**Cc:** Brad Boycks ; richard chandler  
**Sent:** Saturday, January 21, 2006 3:36 PM  
**Subject:** RE: Right to Repair legislation



## Consumer Right to Repair Legislation, January 2006

### Timeline for Resolution of Claims Under SB 448

The timeline for filing and resolving claims under the Consumer Right to Repair legislation (SB 448) would be as follows:

| If a Supplier is <u>not</u> involved | If a Supplier is involved | Step in Process   |
|--------------------------------------|---------------------------|---|
| 0                                    | 0                         | Claim is filed against builder by homeowner.  |
| -                                    | 5                         | Builder must file contribution claim (if any) against supplier within 5 days after homeowner's claim is filed.  |
| -                                    | 20                        | Supplier must respond to builder's contribution claim within 15 days. Supplier can offer to repair, offer to make monetary payment, ask to inspect property, or reject contribution claim.  |
| 15                                   | 25                        | Builder must respond to homeowner's claim within 15/25 days (depending on whether a supplier is involved). Builder can offer to repair, offer to make monetary payment, ask to inspect property, or reject claim. If claim is rejected by builder, homeowner may bring an action. |
| 30                                   | 40                        | Any inspection of property must take place within 15 days after builder's response.   |
| 40                                   | 50                        | After inspection, builder has 10 days to offer to repair, offer to make monetary payment, or reject claim. If claim is rejected by builder, homeowner may bring an action.  |
| 55                                   | 65                        | Homeowner has 15 days to respond to builder's offer.  |
| 60                                   | 70                        | If homeowner rejects offer, builder has 5 days to make supplemental offer.  |
| 75                                   | 85                        | Homeowner has 15 days to respond to builder's supplemental offer. If homeowner rejects offer, homeowner can bring an action.  |

(2)(a)

(8)(a)

(8)(b)

(2)(b)

(2)(e)

(2)(f)

(2)(i)

(2)(j)

(2)(k)

1/23/06

R. Chandler, R Proctor

- 2367 ; 50466

p 4, line 10 supplies =  
provides, just change  
to have different word  
than that defined.

Contractor  $\leftrightarrow$  supplier in

the same situation as

complaint claimant  $\leftrightarrow$  contractor

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRBs0466/P1dn  
RPN:kjf:pg

January 20, 2006

I made mostly minor changes for clarity and consistency. However, I did make the following changes that you should review to see if those changes are OK:

1. I changed the definition of "dwelling" slightly.
2. I removed all references to manufactured homes because they are just one kind of a dwelling. They were not treated any differently than other types of dwellings in the bill.
3. I changed "denying the claim" to "rejecting the claim" throughout the bill.
4. I added the option of rejecting a claim in subs. (2) (b) and (8) (b).
5. I reversed s. 895.07 (2) and (3) because the claimant has to do certain things before going to court. This change fixes the chronology of the bill.
6. I required to the court to order the parties to comply with both ss. 101.148 (2) and 895.07 (2) (a).
7. I added a limit on the claimant's requirement to serve the supplier in s. 895.07 (2) (q) a copy of the notice, but only if the claimant has knowledge of the contractor's failure to notify the supplier.
8. There were conflicting instructions regarding s. 895.07 (2) (j). See your instructions (27) and (28).

Robert P. Nelson  
Senior Legislative Attorney  
Phone: (608) 267-7511  
E-mail: robert.nelson@legis.state.wi.us

## richard chandler

**From:** "richard chandler" <rgcwis@charter.net>  
**To:** <RProcter@axley.com>; <bboycks@wisbuild.org>  
**Cc:** <jdeschane@wisbuild.org>; <CSweeney@Axley.com>  
**Sent:** Saturday, January 21, 2006 2:10 PM  
**Attach:** 05s0466P1.pdf; 05s0466P1dn.pdf  
**Subject:** Fw: Draft of right to cure draft.

Robert and Brad --

I have given the draft an initial review, concentrating on the portions where we requested changes and on the portions that affect suppliers. Overall, I think it looks good. Here are my suggested revisions, with some comments on the intent of the revisions. I will review this some more later this weekend, but I think these are the major points and I wanted to get these to you as soon as possible.

1. Page 4, line 15: Delete the words "under this section" and replace "the claimant" with "a claimant."

Rationale: We don't want a person to initiate an action against a contractor or supplier under any section of the law (not just this section) without complying with the notice and opportunity to repair requirements.

2. Page 4, line 16: After "contractor," add the following: "Before initiating an action against a contractor or supplier, a claimant shall provide the contractor or supplier with the opportunity to respond to the claim in accordance with the provisions of this section."

Rationale: This follows up on Robert's previous suggestion that we want to make it absolutely clear that a claimant not only needs to serve a claim but also needs to give the contractor or supplier an opportunity to repair before initiating an action.

3. Page 10, line 16: Delete the words "the claimant knows that."

Rationale: We want the supplier to have an opportunity to repair in all cases where a contractor has not notified a supplier of a claim, not just in those cases where a claimant knows about the failure to notify.

4. Page 10, line 18: At the end of that line, add the following: "and provide the supplier with the opportunity to respond to the claim in accordance with the provisions of this section."

Rationale: We want to make it clear that a claimant not only has to serve a claim on the supplier but also has to follow the procedures that the claimant would follow in making a claim against a contractor.

5. Page 11, line 3: Before "contribution claim," insert "notice of a."

Rationale: I think this clarifies the language.

6. Page 11, line 5: Insert "contribution" before "claim" and delete the words "from the claimant."

Rationale: I think this clarifies the language.

7. Page 13, line 3: At the end of that line, add the following: "The contractor shall include in its notice a description of the alleged construction defect and include a comprehensive description of all evidence the contractor knows or possesses, including expert reports, that substantiates the nature and cause of the alleged construction defect."

Rationale: This sentence was inadvertently dropped when other revisions were being made.

8. Page 13, lines 6-8: Change the language to read: "offers to settle the contribution claim by monetary payment, the making of repairs, or a combination of both, without inspection, or proposes to inspect ...."

Rationale: This just makes the wording consistent with page 5, lines 6-8.

I would suggest that we proceed as follows:

1. Robert should prepare a consolidated list of the revisions we want to suggest to send to Bob Nelson at the LRB, and send it to him as soon as possible.

2. We should offer to meet with Bob Nelson on Monday to review the revisions we're suggesting and discuss any questions he has about our intent. Here's my schedule on Monday: I'm available before 10:00, from 11:30 to

1/21/06

**Nelson, Robert P.**

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**From:** richard chandler [rgcwis@charter.net]  
**Sent:** Tuesday, January 24, 2006 12:06 PM  
**To:** Nelson, Robert P.  
**Cc:** Brad Boycks; RProcter@axley.com  
**Subject:** Re: Right to Repair legislation

Bob --

Thanks for all your time with us yesterday.

I reviewed the draft analysis you prepared. Overall, it looks good. I think it covers all the main points. I just have a few suggestions to correct typos and make minor corrections or cosmetic changes:

- ✓ Para. 1, line 3: Should the word "giving" be inserted before "written notice?"
- ✓ Para. 1, line 3: Say "he or she," not "the or she."
- ✓ Para. 1, line 4: Say "window or door supplier," rather than "door or window supplier," for consistency. Also, delete "the" before "dwelling."
- ✓ Para. 4, lines 3-5: Re-word this language to conform to the changes we made in the bill in former sub. (2)(L).
- ✓ Para. 4, line 1, and para. 5, line 1: Say "an owner," not "a owner."

Thanks,  
Rick Chandler  
628-0433

01/24/2006